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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 71-1598

JAMES D. HODGSON, Secretary of Labor, Petitioner

v.

ARNHEIM AND NEELY, INC., et al.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT ARNHEIM AND NEELY, INC. and INTERVENOR THE INSTITUTE OF REAL ESTATE MANAGEMENT

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INDEX

		PAGE
Questions Presented		1
Statement of the Case		2
I.	Introduction and Summary	4
	Argument:	
II.	Respondent is not an enterprise within the meaning of the Act with respect to management of buildings owned by others	7
	A. The buildings managed by Arnheim & Neely, Inc. are essentially local in character	7
	B. The statutory definition of enterprise does not cover respondent's activities	8
	1. Respondent's business does not consist of "related activities"	9
	2. Respondent's activities are not performed "either through unified operation or common control"	10
	3. Respondent's activities do not have a "common business purpose"	11
	4. Enterprise is synonymous with ownership	11
	C. Realities of respondent's position	12
	D. Realities of the position of the intervenor, The Institute of Real Estate Management	14
	E. The Court of Appeals was correct in looking to the building owners rather than to respondent in identifying the enterprise	18
III.	Even if respondent is an enterprise, respondent does not meet the requirements for coverage under the Act	20
	A. Respondent is not the employer of the service employees of the managed buildings	21
	B. The "annual gross volume of sales made or business done" by respondent for its management activities is measured by commissions received and not by gross rentals	23
IV.	Conclusion	25

TABLE OF CITATIONS

CASES PAGE

Bartels v. Birmingham, 322 U.S. 126 (1947) 12, 23

Batts v. Professional Building, Inc., 276 F.Supp. 356 (S.D. W.Va. 1967) 7

Board of Supervisors of Louisiana State U. v. Fleming, 265 F.2d 736 (5th Cir. 1959) 21

Bondholders Committee v. Comm's., 352 U.S. 189 (1942) 20

Dandridge v. Williams, 397 U.S. 471 (1970) 20

Greenberg v. Arsenal Bldg. Corp., 144 F.2d 292 (2nd Cir. 1944), rev'd on other grounds sub nom., Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945) 22

Hodgson v. University Club Tower, Inc., ... F.2d .... (10th Cir. 1972), 72LC §32,751 12

Jaffke v. Dunham, 352 U.S. 280 (1957) 20

Langnes v. Green, 282 U.S. 531 (1931) 21

Maryland v. Wirtz, 392 U.S. 183 (1968) 5, 17

Mitchell v. H. B. Zachry Co., 362 U.S. 310 (1960) .. 7

Mungovan v. Manierre, 7L.C. par. 61,646 (N.D. Ill. 1943) 22

Pollard v. Herbert J. Siegel Org. Inc., 272 F.Supp. 821 (D.Md. 1967) 7

Schmidt v. Randall, 160 F.Supp. 228 (D.Minn. 1958) 24

Shultz v. Falk, 312 F.Supp. 608 (E.D. Va. 1970), rev'd. sub nom., Hodgson v. Falk, 439 F.2d 340 (4th Cir. 1971), cert. denied sub nom., Falk v. Hodgson, 404 U.S. 827 (1971) 24, 18, 12, 10

Story Parchment Co. v. Paterson Co., 282 U.S. 555 (1931) 21

10 East 40th St. Building, Inc. v. Callus, 325 U.S. 578 (1945) 7

Statutes.

PAGE

Wirtz v. First National Bank & Trust Co., 365 F.2d 641 (10th Cir. 1966) 9, 24

Wirtz v. Instant Handling, Inc., 63L.C. par. 32,385 (S.D. Ala. 1970) 22

Wirtz v. Jernigan, 405 F.2d 155 (5th Cir. 1968) .. 24, 25

Wirtz v. Savannah Bank & Trust Co., 362 F.2d 857 (5th Cir. 1966) 9

STATUTES

Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201 et seq. 4, 5

Section 3 (r), 29 U.S.C. 203 (r) 5, 8

Section 3 (s), 29 U.S.C. 203 (s) 5

MISCELLANEOUS

1961 U.S. Code Cong. & Admin. News, 1620 (S. Rep. No. 145, 87th Cong., 1st Sess.) 8, 23

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BRIEF FOR RESPONDENT ARNHEIM AND NEELY, INC. and INTERVENOR THE INSTITUTE OF REAL ESTATE MANAGEMENT

QUESTIONS PRESENTED

1. Do the activities of a real estate management firm constitute an "enterprise" within the meaning of Section 3 (r) of the Fair Labor Standards Act, so as to cover employees of buildings which are separately owned but managed by the same firm, and which buildings may or may not be covered by the Act on an individual basis?

Answered in the negative by the court below.

2. Is respondent an "employer" within the meaning of the Act where respondent is merely an agent with no economic interest in the buildings managed other than management fees?

Answered in the affirmative by the court below.

3. Assuming, *arguendo*, that respondent is an enterprise, is the dollar volume test under Section 3 (s) of the Act measured by gross rentals received by the management agent rather than by commissions received by the agent?

Not answered by the court below.

Respondent seeks negative answers to all three questions.

STATEMENT OF THE CASE

Respondent (defendant in the District Court) and intervenor are generally not in disagreement with the statement of the history of the case made by the government on pages 4 through 9 of its brief. The facts in this case were stipulated, and the summarization made by the government on pages 4 through 7 of its brief is accurate so far as it goes; however, several other facts must be noted in order to present a complete picture of Arnheim & Neely, Inc.'s activities.

In addition to its real estate management activities, Arnheim & Neely, Inc. engages in the following business activities: commercial rentals of real property, commercial sales of real property, insurance sales, real estate consultation and appraisals, and residential property sales (Stipulation, par. 203, App. 20).

Pursuant to the typical contract for management entered into between Arnheim & Neely, Inc. and an owner of a managed building, two facts are relevant: (1) The parties agree that all employees are employees of the owner and not the agent (Stipulation, par. 303p, App. 29); and (2) when the management services of

Arnheim & Neely, Inc. are terminated at a particular building, the persons working in that building continue to work there, maintaining their employment relationship with the building and building owner regardless of the change in agents (Stipulation, par. 302, App. 27).

In the management and maintenance of the managed properties, while Arnheim & Neely, Inc. recommends the rates of pay and the fringe benefits of the maintenance and service employees, these rates are subject to approval by the owner of each building in every case (Stipulation, par. 303f & 303h, App. 28). Furthermore, in all of its operations as a manager of a building, Arnheim & Neely, Inc. acts "as agent and in the name of the owner" (Stipulation, par. 301, App. 23-25).

I. INTRODUCTION AND SUMMARY

This case represents an attempt by the government to extend coverage of the Fair Labor Standards Act to an area never before touched—essentially "local" apartments, office and commercial buildings. The government seeks to achieve this result by tying separately owned and unrelated local buildings together into an "enterprise" simply because all of the buildings utilize the services of the same agent or building management firm.

The consequences of such a holding would have far reaching effects on the current practice throughout the United States of many owners of unrelated buildings employing, as agent, the same management firm. If this one fact puts these "local" buildings under the Fair Labor Standards Act, then, of course, the utilization of common building management firms as agent will be affected. It is this disquieting fact that led the Institute of Real Estate Management to seek intervention in this case in the first instance.*

We can see no fact leading to the conclusion that Congress intended, merely by reason of the use of a common management agent, to place buildings under the coverage of the Fair Labor Standards Act, which, because of their "local" nature, would not otherwise be covered.

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*The Institute is a national organization of some 1,650 management firms, managing approximately 7,500 buildings throughout the United States. The importance of this case to each of the Institute's members cannot be stressed too much.

The Court of Appeals rightly held that each separately owned building constituted a distinct entity.

Essentially, respondent and intervenor are asking this Court to uphold the decision of the Court of Appeals for the Third Circuit which held that under the facts presented, Arnheim & Neely, Inc. is not an "enterprise" under Sections 3 (r) and 3 (s) (1) of the Fair Labor Standards Act.

The clear purpose of both the 1961 and 1966 "enterprise" amendments was to prevent fragmentation of coverage, *i.e.*, to eliminate a situation where two employees, working side-by-side, are not equally eligible to receive the protections afforded them by the Act. In advancing this purpose, Congress introduced the "enterprise" concept in 1961, specifically to broaden the number of employees covered by the Act, but not to enlarge the class of employers. *Maryland v. Wirtz,* 392 U.S. 183, 88 S.Ct. 2017, (1968). In addition, it has been clear throughout the history of the Act that Congress was not exercising its full constitutional power under the commerce clause. The "dollar test" under the "enterprise" amendments confirms this point. It has always been true under the Act that "local" businesses were to be outside its scope.

Arnheim & Neely, Inc. acts as, and is legally identifiable as, an "agent" at each separate building. As "agent", respondent is "employed" by each building owner, in a manner not fundamentally different from the employment of the janitorial or maintenance employees who work at each separate building. Although for "enforcement" purposes, Arnheim & Neely, Inc. may be liable as an "employer" if the building owner is liable,

there is no authority existing anywhere for the proposition that an agent rises higher than its principal.

As will be shown in this brief, the government has placed a strained interpretation on the word "enterprise". The Third Circuit refused to accept the government's interpretation and this Honorable Court is asked to do likewise.

It is further respondent's position that even if this court should determine that respondent is an enterprise, nevertheless employees of buildings managed by respondent are not covered by the Act. When the economic realities of the situation are considered, it is apparent respondent is merely an agent, and not an employer within the meaning of the Act.

In addition, the employees referred to above are not covered because the dollar volume should be measured by respondent's commissions, and not by gross rentals.

ARGUMENT

II. RESPONDENT IS NOT AN ENTERPRISE WITHIN THE MEANING OF THE ACT WITH RESPECT TO MANAGEMENT OF BUILDINGS OWNED BY OTHERS.

A. The Buildings Managed by Arnheim & Neely, Inc. Are Essentially Local in Character.

In 1945 this Honorable Court decided the case of *10 East 40th St. Building, Inc. v. Callus*, 325 U. S. 578, 65 S.Ct. 1127 (1945) wherein the employees of an office building were held to be engaged in a local business. This Court said, at page 583 through Mr. Justice Frankfurter:

> "Renting office space in a building exclusively set aside for an unrestricted variety of office work spontaneously satisfies the common understanding of what is local business and makes the employees of such a building engaged in local business."

The viability of this holding is evidenced by its continued citation in recent cases.

> *Mitchell v. H. B. Zachry Co.*, 362 U.S. 310, 80 S.Ct. 739 (1960).
>
> *Pollard v. Herbert J. Siegel Org. Inc.*, 272 F. Supp. 821 (D. Md. 1967).
>
> *Batts v. Professional Building, Inc.*, 276 F. Supp. 356 (S.D. W.Va. 1967).

The Government seeks to nullify the *Callus* holding by injecting the "enterprise" theory, and thus make local activities subject to federal control. It is respectfully submitted that the government's position is both

faulty and anomalous. It is faulty because, as will be shown below, no "enterprise" exists. And it is anomalous because it tries to accomplish indirectly what it cannot do directly, namely, hold a purely local activity to be engaged in interstate commerce.

B. The statutory definition of enterprise does not cover respondent's activities.

Petitioner's brief has attempted to show (pp. 14 et seq.) that respondent's activities fall within the definition of "enterprise" in Section 3 (r) which states:

> "related activities performed (either through unified operation or common control) by any person or persons for a common business purpose."

But the Third Circuit has aptly quoted, 444 F(2) 609 (1972) (p. 22 of Pet. for Certiorari) the Senate Report to the Fair Labor Standards Amendments of 1961, which adopted the "enterprise" concept, as follows:

> "The bill also contains provisions which should insure that a small local independent business not in itself large enough to come within the new coverage, will not become subject to the act by being considered a part of a large enterprise with which it has business dealings."
>
> *1961 U.S. Code Cong. & Admin. News* 1620, 1660.

Petitioner objects to the use of this reference by the Court (p. 21 of its brief), alleging that the situation described there is not the same situation in the instant case. It is submitted, however, that the *intent* of Congress could not be more clearly stated, namely, that small individual businesses are not to be covered.

A breakdown of the definition of enterprise, paralleling petitioner's brief (pp. 14 to 18) follows, wherein it is shown that respondent cannot be termed an enterprise within the Congressional definition.

1. RESPONDENT'S BUSINESS DOES NOT CONSIST OF "RELATED ACTIVITIES".

Petitioner would have the Court believe that respondent's representation of multiple buildings constitutes the "related activities" referred to in the Act. Under this theory, any agent with more than one client automatically has "related activities". It is submitted, however, that the related activities referred to in the Act refer to related activities of *common ownership*.

The classic example of related activities is found in the so-called "bank" cases, where banking activities and the operation of a general office building were held to be related activities within the meaning of the Act.

Wirtz v. Savannah Bank & Trust Co., 362 F.2d 857 (5th Cir. 1966)

Wirtz v. First National Bank & Trust Co., 365 F.2d 641 (10th Cir. 1966)

The key to the holdings in these cases, and in all "enterprise" cases is the existence of a *common ownership* of the related activities. The thrust of petitioner's argument (footnote, p. 15 of Petitioner's brief) is misplaced. Petitioner would have the Court believe that the bank cases stand for the proposition that dissimilar activities such as banking and office buildings can be held to be enterprises. What the courts are saying, however, is that common ownership of a bank and office building, contained in the same structure, are proper examples of

an enterprise. It is not the less similar activities which were held to be an enterprise, but the *more* similar (identical) ownership of the bank and office building.

In short, the petitioner's attempt to define "related activities" in the context of the internal activities of respondent. Such a strained interpretation of the wording of the Act was never intended by Congress, and has not been evident in the courts, save for *Shultz v. Falk*, 439 F.2d 340 (4th Cir. 1971), *cert. denied sub. nom. Falk v. Hodgson*, 404 U.S. 827, 92 S. Ct. 62 (1971).

The business carried on by one office building is entirely separate from that carried on by another office building, or by an apartment building. Lacking common ownership, there can be no related activity. Common agency can no more create a "related activity" than can two patients with the same doctor.

2. RESPONDENT'S ACTIVITIES ARE NOT PERFORMED "EITHER THROUGH UNIFIED OPERATION OR COMMON CONTROL".

Once again, petitioner's attempt to fit the words to the agency situation creates a strained and unnatural interpretation of the Act.

"Unified operation" refers to the principal's activities, not the agent's. In fact, the term "enterprise" itself connotes ownership, rather than agency. If petitioner is right, Congress might just as well have said that all agents with more than one client are considered an "enterprise". Obviously, this was not the intent of Congress. The Act was specifically passed to cover the situations exemplified by the "bank" cases cited above, where employees of a bank and office building, working side by side with a *common owner* create an enterprise.

3. RESPONDENT'S ACTIVITIES DO NOT HAVE A "COMMON BUSINESS PURPOSE".

Webster defines "common" as:

> "belonging to or equally shared by two or more individuals."

Petitioner argues (p. 17 of its brief) that respondent's activities meet the requirement of "common business purpose". The strained and unnatural application of the words to the facts is thus pin-pointed. If by definition, *common* requires more than *one*, then where is respondent's other entity, with which it is acting in common?

The obvious answer is that "common business purpose" refers to those common activities engaged in by *common owners*. A miscellany of buildings and apartments, with a common agent, but separate ownership, does not satisfy the definition. The issue was succinctly stated by the Third Circuit in its opinion, 444 F.2d 609, 613 (p. 21, Pet. for Certiorari):

> "The owner of each of these buildings is not engaged in a business purpose common to all the other eight building owners merely because each employed a common agent. The record is devoid of any other evidence tending to demonstrate that the nine individual building owners have a 'common business purpose'."

4. ENTERPRISE IS SYNONYMOUS WITH OWNERSHIP.

The theme of "ownership" runs thoughout all of the discussion concerning what constitutes an "enterprise". Ownership is a requisite to "related"; it is a requisite for "unified operation and common control"; and it is

a necessity for "common purpose". In short, ownership becomes a *sina qua non* for enterprise.

But even the *existence* of ownership may not create an enterprise, as shown by a recent case, decided since the instant case in the Third Circuit. In *Hodgson v. University Club Tower, Inc.*, ... F.2d .... (10th Cir. 1972), 72 LC §32,751 the operation of two apartment buildings and a hotel, all owned by a single corporation, was nevertheless held *not* to be an enterprise because of a lack of a common business purpose between the hotel and apartments. The court found the hotel and apartments were not so similar or closely related as to satisfy the statutory definition, and specifically refused to follow the Falk case (*supra*). Evidently the instant case was not brought to the Court's attention.

The question must be raised: If commonly owned hotel and apartments are not an enterprise, how can separately owned office buildings and apartments be considered an enterprise? The logical answer must be that a conglomeration of unrelated buildings cannot become an enterprise merely because of a common management agent.

C. Realities of Respondent's Position.

In *Bartels v. Birmingham*, 332 U.S. 126, 67 S. Ct. 1547 (1947), this Honorable Court, speaking through Mr. Justice Reed, held that the economic realities must be considered when dealing with social legislation. The following facts, *inter alia*, demonstrate clearly that each of the buildings is a separate entity, with no concert of action or "common" purpose.

1. Building employees go with the building. If respondent loses a management contract, the employees remain with the building, and do not lose their jobs. (Stipulation, par. 302e, App. 27). This has already happened in at least one of the buildings in question since this suit was instituted (The Keenan Building).

2. Rates of pay, fringe benefits and other wage and salary matters are subject, *without exception,* to owner approval (Stipulation, par. 303f & 303h, App. 28).

3. Each building carries a separate employer identification number (Stipulation, par. 301g, App. 24).

4. Rentals collected by the respondent are deposited in separate bank accounts for each owner (Stipulation, par. 301a, App. 23), referred to specifically in the opinion of the Third Circuit 444 F.(2) 609, 613 (pp. 20 & 21 of Pet. for Certiorari).

5. Respondent does not have ownership in any of the buildings it manages (Stipulation, par. 208, App. 22).

6. Any economic loss suffered in connection with a particular building is that of the owner (A. 25, par. 301j) referred to specifically in the opinion of the Third Circuit, 444 F.2d 609, 613 (1972) (p. 21 of Pet. for Certiorari).

7. Supplies and other items necessary for the operation of a building are purchased separately for each building, contrary to petitioner's statement in its brief (p. 22).

As can be seen from the above, along with many other stipulated facts, the court below has taken a realistic position with respect to the respondent's status:

> "While as an agent the Company (respondent) is liable as an "employer" to adhere to the strictures of the Act, nevertheless such vicarious responsibility does not require that the gross rentals of each of the Company's principals be pooled together merely because each principal has employed the Company as an agent." 444 F.2d 609, 613 (1972) (p. 21 of Pet. for Certiorari).

In the final analysis, respondent is nothing more, and nothing less, than an agent. As stated in the Third Circuit opinion:

> "It would be anomalous to treat the owners of commercial buildings as proprietors of individual businesses when they manage the buildings themselves and as participating in a 'common business purpose' with other building owners merely because they hire a rental agent who manages other buildings." 444 F.2d 609, 614 (1972) (p. 23 of Pet. for Certiorari).

The court held, in effect, that an agent can rise no higher than his principal, a recognized legal tenet.

D. Realities of the Position of Intervenor, The Institute of Real Estate Management.

The Institute of Real Estate Management of the National Association of Real Estate Boards was permitted to intervene in this case by the District Court on a representation that The Institute has approximately 1,650 members located in 342 different cities of the

United States managing in the aggregate a minimum of 5,000 apartment buildings and 2,500 office buildings. The Institute further represented that the issues involved in this case were vital to all the real estate firms operating throughout the United States and therefore their interest should be separately represented by their own counsel in the capacity of an intervenor.

If the thousands of small apartment buildings and office buildings which are not now deemed covered by the Fair Labor Standards Act, because they are small and local in character, are suddenly to become subject to the provisions of the Fair Labor Standards Act solely because a group of them in any locality employ a real estate management firm, then the individual owners of these small local apartments and office buildings will no longer be able to afford to engage the services of a management firm.

As the Institute sees the issue in this case, it is whether small local apartment and office buildings, not otherwise covered by the Fair Labor Standards Act because they are not in interstate commerce, become covered solely by reason of the fact that a group of such small local buildings employ the services of a common real estate management firm. This brief twice refers to this anomoly by referring to the Third Circuit's opinion on the matter. See pp. 14 & 18 of this brief.

The reality of this case is that the government is not seeking coverage over the real employees of Arnheim & Neely, those for whom Arnheim & Neely stands the cost of wages and overtime. The people the government is seeking to gain coverage for are the persons who work in the nine separate office and apartment buildings, the owners of which are actually charged with their

wages and overtime and who continue in the employment of these separate buildings regardless of who the management firm might be at a particular time.

Thus, we say, as did the Third Circuit Court of Appeals, that the realities of this case are that the government is seeking to make an "enterprise" out of nine separate unrelated small buildings, each with completely separate and unrelated ownership. The government evades the realities of the issue by contending that it is the agent, Arnheim & Neely, which is the "enterprise" involved. In this case, the government is not seeking coverage of the real Arnheim & Neely employees: those who work at the company's office. The government is seeking to obtain enforcement over the principals—the nine separate building owners—by bringing this case against their common agent, Arnheim & Neely.

One clear indication that Congress meant to exclude small businesses was the institution of an economic test. Here these nine separate buildings are in no sense related to a common "enterprise", and each one falls below the required economic level for the years covered by the stipulation; and yet the government's theory would thwart that obvious intention of Congress by merely contending that the "enterprise" it is after is Arnheim & Neely. In reality it is not Arnheim & Neely, but the nine separately owned buildings and their owners.

To argue that the janitors and elevator operators in these local businesses are employees of the management firm does not answer the question because under the Fair Labor Standards Act an agent can be held equally liable with his principal as an "employer". As between the real estate management firm and the own-

ers, though both may be considered "employers" for enforcement purposes under the Act, it is clear that the economic consequences of wages and overtime requirements by the employees working in these buildings are borne entirely by the owners and the earnings of Arnheim & Neely, Inc. are in no way affected. See p. 13 of this brief.

Consequently, we submit that no matter who the government chooses to make the defendant, it cannot change the facts regarding economic realities—and the effect of the government's position is to bring wholly unrelated local apartment and office buildings under the Fair Labor Standards Act merely because they hired Arnheim & Neely. To repeat the Third Circuit again,

> "Were the buildings managed by their owners, the Government would not attempt to link them together as an enterprise bound together by a 'common business purpose.' The building owners' employment of the Company as rental agent does not alter this critical fact." (pp. 21-22 of Pet. for Certiorari).

A victory for the government will not result in the persons working in these nine separate buildings becoming covered by the Act. Their owners will just terminate the services of Arnheim & Neely and this will return them to their former status—small local businesses not covered by the Fair Labor Standards Act.

Congress never intended that the activities of the agent should shape the status of the employer. This Honorable Court has stated this in *Maryland v. Wirtz*, 392 U.S. 183, 188, 88 S.Ct. 2017, 2020 (1968), in the case that sustained the constitutionality of the "enterprise

concept". Speaking of the 1961 amendment providing for the "enterprise concept", the Court said:

> "Thus the effect of the 1961 change was to extend protection to the fellow employees of any employee who would have been protected by the original Act, but not to enlarge the class of *employers* subject to the Act."

The result sought by the government is contrary to this determination and was never intended by Congress.

E. The Court of Appeals Was Correct in Looking to the Building Owners Rather Than to Respondent in Identifying the Enterprise.

The petitioner has consistently argued, throughout the lengthy history of this case, that it has not sued the individual buildings and is not interested in holding the individual owners liable. What, in effect, the government is attempting to do is to "wholesale" the liability of the individual owners by holding the common agent.

The Third Circuit specifically rejected the government's position, and thereby rejected the holding of the Fourth Circuit in *Falk* (*supra*). As shown in prior sections of this brief, the definition of "enterprise" is not satisfied by the activities of respondent, which is precisely the reason for the Third Circuit's holding.

No matter what phase of "enterprise" is discussed, the discussion always reverts to the individual buildings. There can be no logical alternative. The petitioner would have the Court put blinders on for purposes of determining coverage, ignoring the "real parties in interest". The Third Circuit has termed this theory as

"anomalous", 444 F.2d 609, 614 (p. 23, Pet. for Certiorari).

One of the buildings managed by Arnheim & Neely, Inc. is University Square #1. At the time this suit was brought, University Square #2, a twin building of equal size, and standing next to University Square #1 so that the two buildings look like one, was not managed by respondent. The two buildings are owned by separate cooperative corporations. If petitioner's theory should prevail, University Square #1 would be covered by the Act, and University Square #2 would be exempt. The exemption would be created, *not* by the nature of the buildings, but by the owner's management agent.

Surely, reason and logic prompted the Third Circuit to say:

> "We think the proper approach under the facts of this case is to consider each of the nine buildings separately." 444 F.2d 609, 614 (1972) (p. 23 of Pet. for Certiorari).

III. EVEN IF RESPONDENT IS AN ENTERPRISE, RESPONDENT DOES NOT MEET THE REQUIREMENTS FOR COVERAGE UNDER THE ACT.

In a long series of cases, this Honorable Court has held that the prevailing party below may, without filing a cross-appeal or a cross-petition for certiorari, assert any ground with support in the record to sustain its position on appeal. In *Jaffke v. Dunham,* 352 U.S. 280, 281, 77 S.Ct. 307, 308 (1957), it was held:

> "A successful party may sustain its judgment on any ground that finds support in the record."

See also *Bondholders Committee v. Comm's.,* 315 U.S. 189, 192 n.2, 62 S.Ct. 537, 539 n.2 (1942).

In *Dandridge v. Williams,* 397 U.S. 471, 475 n.6, 90 S. Ct. 1153, 1156 n.6, (1970), this Honorable Court stated:

> "The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court. Compare Langnes v. Green, 282 U.S. 531, 538, 51 S.Ct. 243, 246, 75 L.Ed 520, with Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 567-568, 51 S.Ct. 248, 252, 75 L.Ed. 544. As the Court said in United States v. American Ry. Express Co., 265 U.S. 425, 435-436, 44 S.Ct. 560, 564, 68 L.Ed. 1087: '[I]t is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon

the reasoning of the lower court or an insistence upon matter overlooked or ignored by it. By the claims now in question, the American does not attack, in any respect, the decree entered below. It merely asserts additional grounds why the decree should be affirmed'."

Thus, although respondent is not aggrieved in the least by the judgment of the Court of Appeals, the government would have respondent file a cross-petition for certiorari. Surely, it is unreasonable to assert that a party which is satisfied with the result below must file a precautionary petition for certiorari. The law does not require a vain and useless act. *Board of Supervisors of Louisiana State U. v. Fleming,* 265 F.2d 736 (5th Cir. 1959).

Under these circumstances, it is submitted that the above-stated rule applies, and that respondent may argue here those issues decided adversely to it below. In any event, this Honorable Court has the power to consider those arguments. *Story Parchment Co. v. Paterson Co.,* 282 U.S. 555, 567-8, 51 S.Ct. 248, 252 (1931); *Langnes v. Green,* 282 U.S. 531, 538, 51 S.Ct. 243, 246 (1931).

A. Respondent Is Not the Employer of the Service Employees of the Managed Buildings.

The Court of Appeals has held that respondent is the "employer" of the maintenance and service personnel working at each managed building. It is respectfully submitted that this holding evidences a misunderstanding of the issue involved. The issue is not whether an agent can be held liable as an "employer" under the Act with his principal, but whether he can be held

separate and apart from his principal. However stated, the issue involved represents an attempt on the part of the government to hold a building management agent liable independently from the building owner, his principal. There is no precedent for such a holding, although the Court of Appeals relied on *Greenberg v. Arsenal Bldg. Corp.*, 144 F.2d 292 (2nd Cir. 1944), *rev'd. on other grounds sub nom., Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 65 S.Ct. 895, (1945).

But in that case both the management agent and the owner were named defendants. The Court underscored the proposition that the liability of the management agent *followed* the liability of the owner. The Third Circuit realized the limited extent of respondent's liability as an "employer" when it spoke of the "vicarious responsibility" of respondent. 444 F.2d 609, 613 (1972) (p. 21 of Pet. for Certiorari).

No court has gone so far as to say that an agent's liability may rise higher than that of the principal for whom he acts. Therefore, if one or more of these owners are not liable, then their agent, Anheim & Neely, Inc., cannot be liable either.

In *Mungovan v. Manierre*, 7 L.C. par. 61,646 (N.D. Ill., 1943), a suit against a building agent *alone* was dismissed on motion for summary judgment, on the ground that the owner of the building in question was the employer at common law, and that the management agent was not the employer. The court further said that Congress did not intend to disrupt the employer-employee relationship as fixed by common law principles of agency law. See also *Wirtz v. Instant Handling, Inc.*, 63 L.C. par. 32, 385 (S.D. Ala. 1970).

The accepted test on the question of who is the employer was enunciated by this Honorable Court in *Bartels v. Birmingham*, 332 U.S. 126, 67 S.Ct. 1547 (1947), where "economic realty" was declared to be the important factor. These economic realities have been considered at length elsewhere in this brief, and need not be repeated here.

It is submitted that the "employer" issue must be answered in a way consistent with the agency relationship established at each building and the economic realities of each situation. The answer, in the light of these guidelines, must be that respondent is not an employer within the meaning of the Act.

B. The "Annual Gross Volume of Sales Made or Business Done" By Respondent for Its Management Activities Is Measured By Commissions Received and Not By Gross Rentals.

The petitioner took the position below that "gross rentals" rather than "commissions" are the measure of the "gross volume of sales made" under the minimum requirements of the Act. These dollar-size provisions were placed into the Act as an "economic test." The Senate Report No. 145 elaborated on the point as follows:

> "(The million dollar test) . . . is the line which the Congress must draw in determining who shall and who shall not be covered by a minimum wage. It is a way of saying that anyone who is operating a business of that size in commerce *can afford* to pay his employees the minimum wage under this law." (Emphasis added.) 1961 U.S. Code & Cong. Ad. News, p. 1624.

It is clear that the intention of the "dollar-test" was to measure the size of the business in questions and also its ability to pay. How should that size be measured? It must be by the ownership of the money received by the business, not by the mere fact that, as agent, respondent acts as a conduit for receipts it does not own.

In support of its conclusion that gross rentals are the test, the lower court cited *Wirtz v. First National Bank & Trust Co.*, 365 F.2d 641 (10th Cir. 1966). But in that case, like all the so-called "bank" and "insurance" cases, the defendant *owned* the building in question. Likewise, the lower court cited *Wirtz v. Jernigan*, 405 F.2d 155 (5th Cir. 1968), where the *owner* of the establishment was also the defendant. Since we are dealing here with an agent who is a mere conduit for someone else's money, those cases are not in point.

On the other hand, in *Schmidt v. Randall*, 160 F. Supp. 228 (D. Minn. 1958) the court held that only commissions, rather than gross receipts, should be included. In that case, defendant hotel handled the sale of tickets as an agent for Greyhound Lines. The court stated, at page 230, that inclusion of gross receipts "would present an unrealistic picture of the defendant's business."

As the District court held in *Shultz v. Falk*, 312 F. Supp. 608 (E.D. Va. 1970), *rev'd. sub nom. Hodgson v. Falk*, 439 F.2d 340 (4th Cir. 1971), *cert. denied sub nom., Falk v. Hodgson*, 404 U.S. 827, 92 S.Ct. 62 (1971):

> "The gross volume of sales made or business done is what is sold by the agent, his services. He cannot sell for himself what is not his. What he sells of the owner he sells for the owners as the

owners' agent. This then is the owners' sale. The owner corporation can only act through agents . . . ."

We, of course, agree with the District Court's conclusion, and hasten to add that the Third Circuit has misconstrued the bank cases and *Jernigan*.

In the final analysis, however, the Third Circuit, while holding that gross rentals are the true test of coverage, nevertheless, has negatived its own conclusion by requiring the petitioner to look at the gross rentals of each building separately.

The conclusion, therefore, must be that the gross rentals collected by respondent on behalf of the respective owners of the buildings which it manages, cannot be a proper measure of the "sales made" or "business done" by the respondent. Since the commissions earned by respondent do not reach the statutory minimum, respondent cannot be covered by the Act.

IV. CONCLUSION

It is only since the 1966 amendments to the Act became effective that the government has moved against management agents, apart from building owners, in attempting to enforce the Fair Labor Standards Act. The building-by-building approach, so necessary for a correct assessment of the interstate activities involved, is being abandoned in the hope that, in a single swoop, great numbers of purely local buildings can be brought within the reaches of the Act. Such an attempt flies in the face of consistent Congressional intent as expressed in the Act, and it twists judicial interpretation of several provisions of the Act far from the consistent line

towards which such decisions do tend when read together. A determination that Arnheim & Neely, Inc. is an employer-enterprise of the maintenance and service employees working at managed buildings would be a radical departure from all the painful attempts made by Congress and the courts to draw recognizable and distinct lines with respect to the reach of federal power under the Act and the still significant activities deemed purely "local".

Respectfully submitted,

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